STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2000-894

May 1, 2001

WPS ENERGY SERVICE, INC.
Complaint Requesting Commission Action to Amend or Alter Commission Order of September 2, 1998 in Docket No. 1998-138 and Determine Whether Maine Public Service Co. and/or Energy Atlantic Has Violated The Requirement of the Order or the Provisions of Chapters 301, 304, or 322

ORDER DENYING IN PART AND GRANTING IN PART MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. SUMMARY

In this order, we deny in part and grant in part the motions to dismiss and for summary judgment filed by Maine Public Service Company (MPS) in response to the complaint filed by WPS Energy Service, Inc. (WPS) requesting that the Commission amend or modify our order in *Maine Public Service Company, Request for Approval of Reorganization Approvals and Exemptions for Affiliated Interest Transaction Approval*, Docket No. 98-138, Order (Sept. 2, 1998) and determine whether MPS and/or Energy Atlantic (EA) has violated the provisions of Chapters 301, 304 and 322 of the Commission's Rules. Under the terms of this Order, we require WPS to follow the dispute resolution procedure in MPS's Implementation Plan for dealing with allegations of violations of our Rules. Based on the information presented by the parties, we will reopen Docket No. 98-138 to investigate whether MPS should continue to be exempted from the employee sharing prohibitions of Chapter 304 of our Rules. We will hold our investigation of this matter in abeyance pending the outcome of the issues sent back for dispute resolution.

II. BACKGROUND

A. Procedural Background

On October 31, 2000, WPS Energy Services, Inc. filed a complaint with the Commission against Maine Public Service Company pursuant to 35-A M.R.S.A. §§ 1306, 3206 and 3206-A. In addition, as a part of this pleading, WPS petitioned the Commission, pursuant to the provisions of 35-A M.R.S.A. § 1321, to alter or amend the Commission's decision in Docket No. 98-138.

On November 17, 2000, MPS filed its response to the complaint along with motions to dismiss and for summary judgment. In support of its motion for summary judgment, MPS filed affidavits from Stephen Johnson and Brent M. Boyles.

On December 18, 2000, WPS filed its Opposition to Maine Public Service Company's Motion to Dismiss and for Summary Judgment, a Statement of Material Facts and Supporting Affidavits of Edward Howard, Tim Charette and Dwayne Conley. On January 5, 2001, MPS filed its Reply to the WPS Opposition along with its Statement of Material Facts As To Which There Is No Issue.

On March 14, 2001, the Hearing Examiner in this matter issued his report which recommended that MPS's motions be denied in part and granted in part. WPS and MPS each filed exceptions to the Examiner's Report on April 9, 2001.

B. Legal Background

Section 3206 of Title 35-A allows affiliated interests of small investor-owned utilities to sell retail generation services to retail customers within and outside its service territory.[1] Section 3206 directs the Commission to promulgate rules to govern the extent of separation necessary between a small investor-owned transmission and distribution utility and its affiliated competitive electricity provider to avoid cross-subsidization and market power abuses. Pursuant to this legislative directive, the Commission has adopted Chapter 304 governing the standards of conduct between transmission and distribution utilities (including small investor-owned utilities) and their affiliated competitive providers.

Chapter 304, § 3(A) provides that a distribution utility may not, through a tariff provision or otherwise, give its affiliated competitive provider preference over non-affiliated competitive electricity providers. In addition, Chapter 304, §§ 3(F) and 3(G) provide that a distribution utility shall process all similar requests for information in the same manner and within the same time period and prohibits the utility from sharing with any competitive electricity provider any market information developed by the utility in the course of responding to requests for distribution service. For an affiliated provider to offer competitive services, the distribution utility must have filed with the Commission an implementation plan which among other things must contain a dispute resolution mechanism. Under the provisions of Chapter 304, § (K), employees may not be shared between a distribution utility and its affiliated competitive provider.

In our order in Docket No. 98-138, we approved a management service agreement between MPS and Energy Atlantic (EA), an affiliated interest of MPS engaged in competitive electricity provider activities, which allowed MPS to perform overall management oversight through the sharing of the MPS president and one

[1] Small investor-owned utilities are defined as those investor-owned transmission and distribution utilities serving 50,000 or fewer retail customers. In its most recent annual report filed with the Commission, MPS reported that it was serving approximately 35,000 customers and thus qualifies as a small investor-owned utility.

member of MPS's senior management. In approving the contract, the Commission noted:

> Our approval is premised on the nature of the management oversight being similar to that of a board of directors, rather than that of executive management. As part of our conditions for approval, MPS is required to notify the Commission in writing as to the information provided to EA and the means by which the information was disclosed to non-affiliated providers.

Order, Docket No. 98-138 at 11.

III. POSITIONS OF THE PARTIES

A. The WPS Complaint

In its complaint, WPS alleges that Stephen Johnson, by acting as General Counsel for MPS and the Vice-President of MPS's unregulated activities, including EA, is in a position to have access to competitive confidential information to the disadvantage of EA's competitors; that in two contract unbundling cases, Mr. Johnson received confidential WPS price information in his capacity as general counsel for MPS and that Mr. Johnson's dual role could be used to undermine the Chapter 307 auction process.[2]

In addition to the problems associated with Mr. Johnson's dual role, WPS alleged that shortly after WPS acquired a retail aggregate customer group and enrolled this customer group with MPS, Energy Atlantic contacted the customer group and asked if there was anything that EA could do to keep the customer from signing with WPS; that MPS violated Chapter 301 of the Commission's Rules by failing to provide WPS's name as the standard offer provider on its bills; that MPS has refused to include WPS's logo as part of its standard offer identification on MPS's consolidated bills in violation of section 3(D) of Chapter 322; and that MPS has routinely provided large customer usage data to Energy Atlantic but refused initially to provide such information to WPS.

WPS concludes that the sharing of MPS employees with Energy Atlantic and the dual role of Mr. Johnson is not in the public interest and creates an unreasonable risk of causing an "anti-competitive" effect within the meaning of Chapter 304(K). WPS, therefore, requests that the Commission:

[2] Chapter 307 of our Rules sets out the procedure which utilities are to follow to sell capacity and energy from their generation assets which have not been divested pursuant to 35-A M.R.S.A. § 3204(1).

1) Investigate this Complaint pursuant to its authority under 35-A M.R.S.A. § 1306;

2) Determine whether MPS and/or Energy Atlantic has violated the requirements of the Order or the provisions of Chapters 301, 304 or 322 of the Commission's rules;

3) Impose any appropriate penalties and remedial actions on MPS and Energy Atlantic as authorized by § 3206-A;

4) Alter or amend the Order to eliminate the waiver of the requirements of Section 3(K) of Chapter 304 and order that MPS and Energy Atlantic completely eliminate any sharing of employees;

5) Assume direct control of the Chapter 307 bidding process for MPS;

6) Order MPS to take action immediately to include logos of CEPs on its billing statements, and to remedy the competitive harm its past failure to do so has caused to competitors to Energy Atlantic, such as by including free WPS Energy bill inserts in MPS bills; and

7) Provide such further relief as the Commission deems appropriate.

B. The MPS Motion to Dismiss

In its motion to dismiss, MPS argues that WPS's complaint should be dismissed pursuant to 35-A M.R.S.A. § 1302 since it was not joined by a sufficient number of complainants. MPS also argues that by asking for its logo on the standard offer service bill, by requesting customer load data information in addition to what MPS has voluntarily provided, and by asking the Commission to assume control of the Chapter 307 bidding process, WPS was seeking to initiate a rulemaking. Finally, MPS argues that WPS's claims have not properly been brought before the Commission since WPS clearly failed to comply with the informal dispute resolution procedures prescribed by MPS's Implementation Plan.

WPS responded to the MPS motion by arguing that the motion was defective pursuant to Rule 402 since it did not contain a clear and concise statement of the material law and facts supporting the motion; that the complaint was not brought pursuant to § 1302 but rather pursuant to §§ 1321, 3206 and 3206-A; that WPS is not required to submit disputes to MPS under MPS's implementation plan; and that WPS's complaint was not intended, nor does it require, a change of any Commission rule.

In its reply, MPS argued that based on the relief requested, WPS's action was "6/7 complaint and 1/7 petition to amend," and that for the reasons articulated in its motion, the complaint portion should be dismissed and since the petition to amend was untimely such petition should also be dismissed.

C. The MPS Motion for Summary Judgment

In addition to its motion to dismiss, as part of its response to WPS's complaint, MPS also filed a motion for summary judgment under M.R. Civ. P. 56. The motion did not contain a "statement of facts not at issue" but did include affidavits of Brent Boyles and Stephen Johnson in support of its motion. In his affidavit, Mr. Boyles states that although MPS is not obligated to provide any hourly customer load data to CEPs, it has tried to comply with reasonable requests to provide them. According to Mr. Boyles, providing hourly and daily load data places a strain on MPS's resources. While MPS believed it was not required to provide the data, it reluctantly agreed to provide additional data to both WPS and EA pending a resolution of this issue based on discussions with WPS, EA and the northern Maine ISA. Currently, MPS provides hourly data to WPS on 14 accounts (9 retail and 5 wholesale), and to EA on 6 retail accounts.

In his affidavit, Mr. Johnson states that he has taken all reasonable steps to avoid having access to information that would provide EA with an advantage. In two special contract unbundling cases, Docket Nos. 2000-441 and 2000-447, Mr. Johnson was sent information on the terms of WPS's retail sale of energy to the customers involved in these cases but destroyed such information prior to reviewing it. In the case of the aggregation group which was contacted by EA, Mr. Johnson states "that he had no contact with Pinkham Lumber, or any other member of the aggregation group." Finally, Mr. Johnson stated that his involvement with EA has been to provide legal advice within his sphere of competence, provide advice and direction on all important business decisions, negotiate and draft loan agreements, and to act as contact with EA's major wholesale suppliers in matters relating to formal contracts.

In response to MPS's motion for summary judgment, WPS argues that MPS's motion must be denied as it is procedurally defective in that MPS did not provide a "statement of facts not in dispute" as required by M. R .Civ. P. 7(d), that the affidavits of Boyles and Johnson were defective since they did not state that they were made on personal belief and they do not show affirmatively that the affiant was competent to testify to the matters stated in the affidavits. WPS also argues that MPS's motion must be denied because it has not demonstrated that there are no genuine issues of material fact. In support of this position, WPS filed the affidavits of Edward Howard, Tim Charette and Dwayne Conley.

In his affidavit, Mr. Charette states that he had worked for Energy Atlantic until March 31, 2000 and that he worked on a regular basis with Steve Johnson. He states that Mr. Johnson worked on a regular basis with EA, its employees and its customers. Mr. Johnson performed direct supervisory duties and participated in discussions regarding the marketing and acquisition of customers and the negotiation of

supply contracts. Mr. Charette also stated that at a meeting with other EA employees, Mr. Johnson mentioned the price that McCain Foods had negotiated with WPS.

Mr. Howard, in his affidavit, also states that Mr. Johnson was involved in the day-to-day management of EA. He further states that on the day that WPS filed the necessary registration data to enroll an aggregation group it had acquired, Ken Borneman, the aggregator, called him and said that he had been contacted by EA to see if "there was anything that could be done to keep the customer from enrolling with WPS Energy." At the time he was called, Mr. Howard states that none of the information regarding WPS Energy's acquisition of the customer had been made available to the public or to the local facility managers of the aggregation group itself. Finally, Mr. Conley testified that in August, 2000, when WPS asked for load information on its large customers, it was told that MPS could not perform such duties with current staff. It was not until WPS confronted MPS with the fact that it was supplying this same information to EA that MPS provided the requested information to WPS.

MPS replies that, based on the affidavits filed, it was clear that the only factual issue in dispute concerned EA contacting the aggregation group. The remaining issues either relate to: 1) legal conclusions concerning Mr. Johnson's role; 2) wholly unsupported factual allegations; or 3) issues of law. Therefore, MPS's motion for summary judgment should be granted on such issues.

III. DECISION

A. Legal Standards Governing Review of Motions

The Commission may consider a motion to dismiss a complaint for failure to state a claim upon which relief can be granted in a proceeding before it pursuant to Rule 12(b)(6) of the Maine Rules of Civil Procedure. *See* 35-A M.R.S.A. § 1311. A motion to dismiss under Rule 12(b)(6) should only be granted where it appears beyond doubt that the complainant can prove no set of facts in support of his claim which would entitle him to relief. *Richards v. Ellis*, 233 A.2d 37, 38 (Me. 1967). Where a motion to dismiss is accompanied by affidavits it is to be treated as a motion for summary judgment. M.R. Civ. P. 12(b).

A party is entitled to summary judgment under Rule 56 when there are no genuine issues of material fact and the party, based on the undisputed facts, is entitled to judgment as a matter of law. *Pepperell Trust Co. v. Mountain Heir Financial Corp.*, 708 A.2d 651, 654 (Me. 1998). A genuine issue of fact is present where there is sufficient evidence concerning the claimed factual dispute as to require a choice between the parties' differing versions of the truth. *Paschal v. City of Bangor*, 747 A.2d 1194, 1197 (Me. 2000). Summary judgment is appropriate only when facts before the tribunal conclusively preclude recovery by one party and therefore judgment in favor of the other party is the only possible result. *Spickler v. Greenberg*, 586 A.2d 1232, 1234 (Me. 1991).

In this instance, the respondents have filed both a motion to dismiss and for summary judgment. Since there appears to be a significant overlap in the motions we will address the matters raised by MPS by issue rather than by the individual motion.[3]

B. Dismissal Due to Lack of Signatures

MPS argues that since WPS's complaint has not been signed by ten persons, must be dismissed under Section 1302 for want of jurisdiction. WPS responds that the complaint was brought pursuant to 35-A M.R.S.A. §§ 1306, 3206 and 3206-A.[4] Implicit in MPS's argument is that outside of the Section 1302 process, there is no process available for a CEP or any other single entity to bring a complaint to the Commission. We disagree.

Under 35-A M.R.S.A. § 1303, the Commission may on its own motion investigate any matter relating to a public utility. We have interpreted this provision to allow an affected person to request that the Commission initiate an investigation under Section 1303. *Yorktowne Paper Mills of Maine et al. v. Central Maine Power Company*, Docket No. 95-224 (June 5, 1996). As we concluded in *Yorktowne*, section 1303 provides the Commission with wide discretion as to whether or not to investigate utility actions. The real issue is whether the complaint has arguable merit. If the answer to this question is yes, then the matter should be investigated by the Commission regardless of whether the complaint was signed by ten people.[5]

[3] WPS argues in its brief that MPS's motion should be denied for failing to follow Rule 7(d) of the Maine Rules of Civil Procedure and Rule 402 of our Rules of Practice. MPS has, through its filings, properly advised WPS and the Commission of the issues and arguments that is raising with the Commission. WPS's arguments on this point are therefore rejected.

[4] Section 1306 of Title 35-A governs the Commission's decision-making process and does not provide any basis for the filing of a complaint against a public utility. Section 1303 of Title 35-A, however, does grant the Commission the authority to investigate public utility practices on the Commission's own motion.

[5] We would note that there are some procedural differences between a Section 1302 complaint and a Section 1303 request. The most significant difference is that a complaint filed by ten persons under Section 1302 and not dismissed due to lack of merit must be decided by the Commission within nine months of the time of filing.

While one could argue, and it appears that MPS in fact does, that WPS's complaint should have been labeled a "request for investigation" rather than a "complaint," such a distinction promotes form over substance and does not provide a basis for a dismissal of the case. If WPS's "complaint" has arguable merit, we should investigate those issues. If the request does not, then it should be dismissed. It is against this standard that we will judge WPS's complaint and the motion before us. MPS's motion to dismiss this matter due to insufficient signatures, however, is denied.

C. Dismissal of Petition to Reopen on Timeliness Grounds

By way of its complaint, WPS has requested that we modify our order in Docket No. 98-138, which provided MPS with an exemption from the general prohibition against the sharing of employees between a distribution utility and its affiliated competitive provider. MPS argues that the petition to reopen is untimely and therefore, must be dismissed.

Section 1004 of our Rules of Practice and Procedure provides that petitions to modify, rescind or vacate any decision or order of the Commission must be filed within 20 days of the date of decision. 35-A M.R.S.A. § 1321, however, provides that the Commission may, at any time, alter or amend any order. MPS cites the Law Court case of *Stratton Water Co. v. PUC*, 397 A.2d 188, 190 (Me. 1979) in support of its position that reopenings under § 1321 may only be made upon the PUC's own initiative. MPS's reliance on *Stratton* here is misplaced. The Law Court in *Stratton* stated that the provisions and procedural requirements of Section 1321 were inapplicable where a case had been remanded back to the PUC by the Law Court. Nowhere does the *Stratton* decision hold, or even imply, that the Commission cannot rely on Section 1321 to reopen a case based upon a request of an affected person.

A request that the Commission reopen a case pursuant to Section 1321 is similar to a request that the Commission exercise its discretion and open a Section 1303 investigation. The proper standard then, discussed in Section III.B. above, is whether the request has arguable merit. If so, the Commission will investigate the matter further and then determine whether an earlier order should be modified or vacated. Therefore, MPS's motion to dismiss WPS's request to reopen our decision in Docket No. 98-138 on timeliness grounds is also denied.

D. Requirement That WPS's Logo Be Included on Bill

In its complaint, WPS, in its capacity as the standard offer service provider in MPS's territory, alleges that MPS violated Section 5(B) of Chapter 301 of our Rules by failing to include its name on MPS's T&D utility bills and also continues to violate the requirements of section 3(D) of Chapter 322 of our Rules by refusing to include WPS's logo on MPS's consolidated bills. MPS counters in its motions that the failure to identify WPS as the standard offer service provider on its bill was an inadvertent omission which has been corrected. With regards to WPS's logo request, MPS argues that there is no current requirement that a standard offer service provider's logo be placed on T&D bills

and, therefore this request, which MPS claims to be a request for rulemaking, must be dismissed.[6]

The Examiner's Report concluded that our rules do not require that a standard offer service provider's logo be included as part of a utility's consolidated bill and therefore, recommended that we grant MPS's motion to dismiss this count of WPS's complaint. In its exceptions to the Examiner's Report, WPS stated that it did in fact agree with the Examiner's conclusion. WPS explained, however, that it never intended the logo issue to be a separate allegation of a violation of a Commission rule. Rather, WPS was asking that MPS be ordered to place its logo on MPS's bill as a remedy for failing to include WPS's name as the standard offer provider. Given WPS's clarification of its position, WPS's complaint on this issue will be considered withdrawn and the specific request relief will be incorporated into WPS's claim that MPS failed to include WPS's name on its consolidated bill.

E. Failure to Follow the Dispute Resolution Procedures

MPS argues that WPS's complaint should be dismissed because WPS failed to follow the procedures required under the dispute resolution provisions of the Company's Implementation Plan. WPS counters that the dispute resolution provisions of the Implementation Plan are voluntary and that nothing in the Plan, in Chapter 304, or in any Commission order imposes such a requirement. We disagree with WPS's argument that the dispute resolution provisions of the Company's Implementation Plan are purely voluntary.

Chapter 304 of our Rules specifically requires a T&D utility with an affiliated competitive electric provider to establish a dispute resolution procedure as part of its required Implementation Plan. The dispute resolution procedure must be designed to address complaints alleging violations of 35-A M.R.S.A. §§ 3205 and 3206, the utility's implementation plan and the provisions of Chapter 304. Chapter 304 goes on to provide that the dispute resolution procedure must at a minimum designate a person to conduct an investigation of the complaint, communicate the results of the investigation within 30 days and inform the claimant of his right to file a complaint with the Commission if not satisfied with the results of the investigation.

On August 5, 1999, MPS filed its Chapter 304 Implementation Plan, which went into effect by operation of rule. Under the dispute resolution provisions of its Plan, a person alleging a violation of any provision of Chapter 304 shall first bring the alleged violation to the Company's Chapter 304 compliance officer, who is to determine whether the written complaint sufficiently sets out the conduct complaint and the resulting

[6] We do not believe that WPS intended to initiate a rulemaking on this or any other issue raised in its complaint. To the extent WPS does indeed wish to initiate a rulemaking, than the procedures set forth in Section 502 of the Commission's Rules of Practice and Procedure, Chapter 110, should be followed.

violations. If the complaint is accepted, it is to be referred to an independent law firm for non-binding arbitration. If MPS and the complainant do not agree to accept the findings and recommendations of the arbitrator, the complainant may file its complaint with the Public Utilities Commission.

Thus, we find that both Chapter 304 and the Company's approved Implementation Plan contemplate a procedure whereby persons believing that a utility with an affiliated competitive electricity provider has violated relevant provisions of our rules or statute would first have it considered as part of an informal resolution process. Requiring disputes to first go through this process accomplishes several objectives. First, it enhances the possibility of settlement by forcing the adverse parties to address their differences outside the formal Commission process. Second, it provides an alternative, and possibly more efficient, means of fact finding. Finally, by enhancing the likelihood of settlement and providing for an alternative fact finding procedure, the process preserves already strained Commission resources.

WPS argues that under the provisions of Chapter 304, § 5(C), the Commission may open an investigation into a utility's compliance with its plan or with the plan itself at any time. We agree with WPS that similar to an investigation initiated under 35-A M.R.S.A. § 1303, such an investigation could be initiated based on the request of a party. Where the Commission is asked to address a very broad institutional problem involving a utility and its competitive affiliated provider it may be appropriate for the Commission to initiate an investigation under Section 5(C) of Chapter 304. We do not believe such a procedure should be used, however, to completely supplant the dispute resolution process envisioned by Chapter 304 and MPS's approved Implementation Plan.

In the case before us, WPS complains of four specific violations of our rules: disclosure of confidential WPS generation price information provided in contract unbundling proceedings; disclosure of customer enrollment information to EA; disparate treatment concerning provision of large customer usage data; and failure to include its name as the standard offer provider on consolidated utility bills. Consistent with our discussion above, we find that WPS should go through the dispute resolution procedure set forth in MPS's Implementation Plan on these specific grievances before these matters are to be considered by the Commission.

In its exceptions to the Examiner's Report, MPS argues that while it agreed with the Examiner's recommendation to send these matters back for dispute resolution, the Commission should go further and grant summary judgment on these matters since there were no genuine issues of facts at issue. We disagree. The affidavits submitted by WPS raise genuine issues of facts about what happened in these particular instances and the circumstances surrounding the alleged violations. We therefore conclude that there are sufficient factual issues to warrant referring these matters back for dispute resolution in accordance with MPS's Implementation Plan.

The WPS petition also raises a broader institutional problem concerning Mr. Johnson's dual role with MPS and EA. In its petition, WPS argues that Mr. Johnson in his capacity as MPS's general counsel is in a position to receive, and in the two special rate contract unbundling cases did receive, confidential business information of WPS. WPS also noted that this dual role is particularly troubling in the context of the 307 entitlement auction where it could work to EA's benefit and WPS's detriment. As this part of the complaint addresses broad institutional issues and seeks to modify, or at least clarify our decision in Docket No. 98-138, which provides MPS with an exemption from the prohibition of sharing employees between the utility and its affiliated CEP, we conclude that such matters must ultimately be decided by the Commission and, therefore, this issue should not be subject to the dispute resolution procedures and requirements set forth in Chapter 304 and MPS's Implementation Plan. We next address whether WPS's complaint has sufficient merit to warrant further investigation and whether there are genuine factual issues in dispute regarding this issue.

F. Mr. Johnson's Dual Role

In their affidavits, Messrs. Charette and Howard, both former employees of EA, state that while at EA they worked regularly with Mr. Johnson and that he performed direct supervisory duties and participated in discussions regarding the marketing and acquisition of customers and the negotiation of customer supply contracts as well as wholesale arrangements with EA's supplier.

Mr. Johnson states in his affidavit that his involvement at EA has been on legal matters and that he provides advice and direction on all important business matters. In its response to WPS's complaint, MPS notes that "the manage like a board of directors standard," set forth in Docket No. 98-138, is so vague that reasonable people can legitimately differ as to whether particular actions fall within or outside the permitted scope of behavior. MPS notes that some boards provide only the most general sense of direction for a corporation while others attend to all details of the corporation's business. MPS argues that, given the vague standard set out by the Commission, Mr. Johnson can always be second-guessed as to compliance with the Commission's order.

As a general matter, the Commission has prohibited T&D utilities and their affiliated competitive providers from sharing employees. MPUC Rules Ch. 304, § 3(K). The Commission may exempt a utility from this prohibition if the Commission finds that the sharing of employees is in the best interests of the public and also would have no anticompetitive effect. Ch. 304, § 3(H)(1). An exemption is valid until the Commission determines that a modification or removal is necessary.

The allegations in WPS's complaint and further supported in the affidavits filed in opposition to MPS's Motion for Summary Judgment raise significant issues concerning Mr. Johnson's dual role with EA and MPS and whether this dual role poses a threat to the operation of the competitive market in northern Maine which warrant further investigation. Specifically, we find that as part of an investigation, we must

address in the following questions: (1) were there abuses of the dual role; and (2) does experience suggest that the dual role is inherently problematic (i.e., will problems of proof always be insurmountable). Finally, based on MPS's own statement, at a minimum, were we to continue to allow MPS and EA to share employees, a clarification of our "manage like a board of directors" standard is warranted.

We therefore conclude that it is appropriate to open an investigation into the issue of MPS's sharing of employees within EA and to reopen our decision in Docket No. 98-138. Based on the conflicting statements contained in the affidavits filed with us, we find that there are genuine issues of material facts which need to be determined during the course of our investigation. MPS's motion for summary judgment on this issue is, therefore, denied.

Since there is an overlap between this issue and the issues which have referred back to the parties for dispute resolution, we will hold our investigation in abeyance until the dispute resolution process has been completed. Under the provisions of the MPS's dispute resolution process, the findings and recommendations of the arbitrator are to be provided to MPS and the complainant within thirty days of the date the complaint is received by MPS. For purposes of this matter, WPS's complaint should be considered to have been received by MPS as of the date of this Order. MPS and WPS should report back to the Commission after the dispute resolution process is concluded and inform the Commission what matters, if any, must still be addressed by the Commission.

Accordingly, it is

O R D E R E D

1. That Maine Public Service Company's Motions to Dismiss and For Summary Judgment are granted in part and denied in part as set forth above;

2. That the allegations set forth in paragraphs 8, 9, 10 and 11 of WPS's complaint filed on October 30, 2001 are remanded back to the parties for processing under MPS's dispute resolution procedure;

3. That WPS's request that the Commission initiate an investigation into the sharing of employees between Maine Public Service Company and Energy Atlantic is granted;

4. That Docket No. 98-138 is reopened for purposes of determining whether the exemption from the provisions of Chapter 304, section 3(k) of our Rules granted by way of our decision of September 2, 1998 should be rescinded or should, in any other way, be modified; and

5. That the Administrative Director shall serve a copy of this Order on all parties and interested persons in Docket No. 98-138.

Dated at Augusta, Maine, this 1st day of May, 2001.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
Diamond

THIS DOCUMENT HAS BEEN DESIGNATED FOR PUBLICATION